APPEAL NO. 050357
FILED APRIL 12, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on January 12, 2005. The record closed on January 20, 2005. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) reached maximum medical improvement (MMI) on September 7, 2003; that the claimant's impairment rating (IR) is 10%; that the first impairment certification of MMI and IR given by (Dr. Os) on June 2, 2004, became final; and that the claimant had disability beginning on October 2 through November 6, 2001, and beginning on October 15, 2002, through September 7, 2003, and at no other times. The appellant (self-insured) appealed, disputing the determinations of MMI, IR, disability, and the finality of Dr. Os' June 2, 2004, certification. The appeal file does not contain a response from the claimant.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on (date of injury), and that (Dr. Ob) is the Texas Workers' Compensation Commission (Commission)-appointed designated doctor. Both the claimant and Dr. Os testified at the CCH.

DISABILITY

Section 401.011(16) defines "disability" as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." The hearing officer specifically found in Finding of Fact No. 6 that "[d]ue to the claimed (date of injury) injury, the Claimant was only unable to obtain and retain employment at wages equivalent to Claimant's pre-injury wage beginning on October 2, 2001 through November 6, 2001, and beginning on October 15, 2002 through the date of this hearing, and at no other times." The self-insured argues that the hearing officer erred in determining that the claimant had disability from October 15, 2002, through the date of the CCH. The claimant testified that he injured his low back on (date of injury). The self-insured contends that the claimant failed to meet his burden noting that the claimant testified at the CCH that he was able to work until a "new injury" occurred on (alleged date of injury). The claimant testified that on (alleged date of injury), he injured his right knee and shoulder, and back when he fell after his leg gave way. Dr. Os testified that the claimant's leg gave way from radicular pain and related the claimant's inability to work after that date to the compensable injury of (date of injury). We note that extent of injury was not an issue before the hearing officer. Disability and MMI are different concepts under the 1989 Act. While a claimant's entitlement to temporary income benefits (TIBs) ends when he or she reaches MMI,

disability, the inability to obtain and retain employment at wages equivalent to the preinjury wage (Section 401.011(16)), does not necessarily end on that date. Texas Workers' Compensation Commission Appeal No. 980919, decided June 15, 1998; and Texas Workers' Compensation Commission Appeal No. 91060, decided December 12, 1991. That is, disability may exist separately from entitlement to TIBs. Texas Workers' Compensation Commission Appeal No. 950879, decided July 17, 1995.

The issue of disability to be decided at the CCH was specifically stated as follows: As a result of the compensable injury sustained on (date of injury), did the claimant have disability from September 14, 2002, through September 11, 2003? However, based on the evidence presented, the hearing officer specifically found that "[d]ue to the claimed [date of injury] injury, the Claimant was only unable to obtain and retain employment at wages equivalent to Claimant's pre-injury wage beginning on October 2, 2001 through November 6, 2001, and beginning on October 15, 2002 through the date of this hearing, and at no other times." In both the conclusion of law and the decision, the hearing officer determined that the claimant had disability beginning on October 2 through November 6, 2001, and beginning on October 15, 2002, and continuing through statutory MMI on September 7, 2003, and at no other times. In its appeal, the self-insured only appeals that portion of the disability determination from October 15, 2002, through the date of the CCH, contending that the claimant failed to meet his burden of proof.

Disability is a question of fact to be determined by the hearing officer. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given to the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). There was clearly conflicting evidence in this case concerning disability and based upon the above standard of review, we find no basis to reverse the hearing officer's finding concerning disability. Since the issue was limited as to the ending date of disability, we perceive no error in the hearing officer's determination of disability in this regard. We affirm the hearing officer's determination that the claimant had disability beginning on October 2 through November 6, 2001, and beginning on October 15, 2002, and continuing through September 7, 2003, and at no other times.

FINALITY OF CERTIFICATION

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12) provides that the certifications and assignments that may become final are: (1) the first valid certification of MMI and/or IR assigned or determination of no impairment; (2) the first

valid assignment of IR after the expiration of 104 weeks from the date income benefits begin to accrue or the expiration date of any extension under Section 408.104, if the employee has not been certified as having reached MMI; or (3) the first valid subsequent certification of MMI and/or assignment of an IR or determination of no impairment received after the date a certification of MMI and/or assignment of IR or determination of no impairment is overturned, modified, or withdrawn by agreement of the parties or by a final decision of the Commission or a court. The rule further provides for situations in which a designated doctor has provided multiple ratings when extent of injury is in dispute.

A decision and order from a prior CCH held on November 19, 2002, was in evidence. The issues to be decided at the November 19, 2002, CCH were whether the claimant reached MMI and if so, on what date and the claimant's IR. On May 10, 2002, Dr. Ob examined the claimant and certified that the claimant reached MMI on December 7, 2001, with a 0% IR. It is undisputed that the first certification of MMI and IR given by Dr. Ob was signed on May 10, 2002. The hearing officer in the November 19, 2002, CCH determined that the certification of MMI and IR by Dr. Ob was against the great weight of the medical evidence and determined that the claimant had not reached MMI. Commission records indicate that this determination was not appealed. The claimant was subsequently sent to Dr. Ob for another examination. On January 30, 2003, Dr. Ob reexamined the claimant and again certified that the claimant reached MMI on December 7, 2001, with a 0% IR. In a Report of Medical Evaluation (TWCC-69) dated June 2, 2004, Dr. Os certified that the claimant reached statutory MMI on September 7, 2003, with a 10% IR. The doctrine of res judicata, generally speaking, prevents the relitigation of a claim or cause of action that has been finally adjudicated as well as related matters that, with the use of due diligence, should have been litigated in the prior suit. Texas Workers' Compensation Commission Appeal No. 030055, decided February 26, 2003. It has been found applicable by the Appeals Panel to the dispute resolution process. *See* Texas Workers' Compensation Commission Appeal No. 951111, decided August 23, 1995. As previously noted, it was determined at a prior CCH that Dr. Ob's certification that the claimant reached MMI on December 7, 2001, with a 0% IR was against the great weight of the medical evidence and the fact that Dr. Ob reached the same conclusion based on a different date of examination does not change that fact.

We recognize that Rule 130.12 was effective on March 14, 2004, however, we have interpreted that both Rule 130.12 and Section 408.123 can be read together. *See* Texas Workers' Compensation Commission Appeal No. 041241-s, decided on July 19, 2004. Rule 130.12(d) states that "[t]his section applies only to those claims with initial MMI/IR certifications made on or after June 18, 2003." Accordingly, Rule 130.12 does not apply to this case as the first certification of MMI and assigned IR was made on May 10, 2002. The hearing officer's determination that the first impairment certification of MMI and IR given by Dr. Os on June 2, 2004, became final is reversed and a new determination rendered that the first impairment certification of MMI and IR given by Dr. Os on June 2, 2004, did not become final.

MMI AND IR

Sections 408.122(c) and 408.125(c) provide that the report of the designated doctor has presumptive weight, and the Commission shall base its determinations of MMI and IR on the designated doctor's report unless the great weight of the other medical evidence is to the contrary. Section 408.125(c) further provides that if the great weight of the other medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Commission, the Commission shall adopt the IR of one of the other doctors. The only certification of MMI and IR in evidence other than the certification from the designated doctor, is from the treating doctor, Dr. Os. The hearing officer's determination of MMI and IR appears to be premised upon his determination that Dr. Os' certification of MMI and IR became final. In the narrative attached to the TWCC-69, Dr. Os states that an EMG/NCV revealed L4-5 radiculopathy on the right and L5 on the left. Dr. Os assessed impairment of 10% for the lumbar spine using the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides) placing the claimant in Diagnosis-Related Estimate Lumbosacral Category III. The hearing officer noted in his discussion that the differences in the IR certified by Dr. Ob and Dr. Os turn on the presence or absence of a radicular component to the claimant's injury. The certification of MMI and IR by Dr. Ob cannot be adopted for reasons previously discussed. There is sufficient evidence in the record to support the hearing officer's determination that the claimant reached MMI on September 7, 2003, and had an IR of 10%.

We affirm the determinations that the claimant had disability beginning on October 2 through November 6, 2001, and beginning on October 15, 2002, through September 7, 2003, and at no other times; that the claimant reached MMI on September 7, 2003; and that the claimant's IR is 10%. We reverse the determination that the first impairment certification of MMI and IR given by DR. Os on June 2, 2004, became final and render a new determination that the first impairment certification of MMI and IR given by Dr. Os on June 2, 2004, did not become final.

The true corporate name of the insurance carrier is **(a certified self-insured)** and the name and address of its registered agent for service of process is

CT CORPORATION
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Robert W. Potts
Appeals Judge